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No. _____

In the Supreme Court of the United States

October Term, 1981

ROSE M. SALAZAR,

Petitioner,

vs.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
BRIEF FOR PETITIONER

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November, 1981

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QUESTIONS PRESENTED

1. In a disparate treatment discriminatory discharge case, do the district court's Findings of Fact comply with Federal Rule of Civil Procedure, Rule 52 (a) where no subsidiary findings are made concerning the evidence of disparate treatment and pretext?

2. Is the appellate court bound to review ultimate factual findngs of no discrimination by the clearly erroneous standard, or may it disregard the findings and determine whether or not there was discrimination based on subsidiary findings or the record?

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No. ———

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ROSE M. SALAZAR,

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vs.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BRIEF FOR PETITIONER

Rose M. Salazar petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the decree of the United States District Court for the Northern District of California.

ORDER AND OPINIONS BELOW

The unreported opinion and judgment of the Court of Appeals is reproduced in full as Appendix A to this

Petition. The unreported Findings of Fact and Conclusions of Law by the district court are reproduced in full as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULES INVOLVED

The relevant provisions of Section 703 of Title VII of the Civil Rights Act, as amended (42 U. S. C. §§ 2000e, et seq.) are as follows:

For the purposes of this subchapter—

• • •

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year and any agent of such a person. . . .

42 U.S.C. 2000e(b)

It shall be an unlawful employment practice for an employer—

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. 2000e-2(a)

The relevant provision of the Federal Rules of Civil Procedure is as follows:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

Rule 52(a), Federal Rules of Civil Procedure

STATEMENT OF THE CASE

Petitioner filed this action on February 23, 1973 alleging, *inter alia*, that Respondent violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§

200Je, *et seq.* by discriminating on the basis of her sex and national origin when it disciplined, discharged, and denied adequate grievance procedures to her.[1] Petitioner also alleged discriminatory denial of a salary increase, and various promotional opportunities.[2] Federal jurisdiction was predicated upon §706(f) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(f)).

Following a lengthy trial, the district court entered judgment for Respondents on all issues on January 24, 1975. The court found that Petitioner was discharged because of unauthorized absence from work, and a prior history of poor performance, including her record of absences and her inability to get along with supervisors and co-workers. (Finding of Fact No. 13). The court concluded that "plaintiff was not terminated because of her sex or national origin. . . . She was terminated for legitimate, non-discriminatory reasons, which were not used as a pretext for sex or national origin discrimination." (Finding of Fact No. 15).

The court also found that "plaintiff is a female of Mexican-American national origin. Her national origin is not apparent from her appearance or speech. During her employment, no BART management employee, including her supervisor, was aware of her

[1]The case was tried as a disparate treatment case. See e.g. *McDonnell Douglas Corp. v. Green* (1973) 411 U. S. 792.

[2]To focus the issues, this Petition only addresses the discriminatory discipline and discharge claims.

national origin. . . . In fact, she told her friend and fellow employee, Lizzie Payne, that she was not Mexican-American, but 'white'". (Finding of Fact No. 2)

The Ninth Circuit affirmed the district court's decision, holding, *inter alia*, that "we cannot say that the district court's findings of fact are clearly erroneous. We cannot disturb the district court's finding that there was no discriminatory motive, especially in light of the absence of any evidence that Salazar's supervisors at BART were aware that she is Mexican-American."

The evidence introduced by Petitioner during the ten day trial consisted almost entirely of evidence of disparate treatment and other evidence calculated to establish that the employer's proffered justification for the discharge was pretexual. Indeed, before the Ninth Circuit Respondent conceded that Petitioner had made out a prima facie case of discrimination.

Statistical evidence was introduced to demonstrate that Respondent's management and supervisory employees were nearly entirely anglo[3] and white, and that Petitioner's supervisors were anglo and white, while the general labor force employed by Respondent under-utilized Mexican-Americans and women, when compared to the relevant labor pool. Petitioner testified that her supervisors used derogatory ethnic expressions when describing minority employees.

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[3]The term "anglo" is used to describe persons of Northern European ancestry.

Disparate treatment evidence included evidence that anglo females, and males with attendance and personality problems comparable to those alleged of Petitioner were not discharged or, in some cases, even seriously disciplined. For example, Petitioner's anglo co-worker, Alvina McIntyre had a comparable attendance record (indeed the supervisor kept attendance records *only* for Petitioner and Ms. McIntyre), and a history of serious personality conflicts with co-workers including Petitioner. Despite these difficulties, not only was Ms. McIntyre not discharged or disciplined, but she was given favorable performance evaluations while Petitioner was given poor evaluations. Much of the friction between Petitioner and Ms. McIntyre was related to suggestions for improvement made by Petitioner and adopted by her supervisors. Despite this record of obstruction by Ms. McIntyre and constructive input by Petitioner, Respondent's superviors attempted to belittle Petitioner's accomplishments in performance evaluations, and credited complaints from Ms. McIntyre despite her known antipathy to Petitioner.

Evidence introduced by Respondent to document Petitioner's alleged absentee record included undisputed errors (for example, counting attendance at her own performance evaluation as an unauthorized absence), were skewed in the time periods covered, and did not include the original time sheets, which had suspiciously disappeared prior to trial.

The evidence concerning the specific incident that allegedly precipitated discharge was, of course, disputed. What was not disputed was that the underlying attendance "policy" requiring an employee to give her supervisor the "necessary and compelling reasons for her planned absence" was virtually *never* enforced. Indeed, the actual practice was to permit an employee to take time off for personal matters without providing a detailed explanation provided that accrued vacation or sick time was available, which it was in Petitioner's case. Nevertheless, Petitioner's absence on two occasions—one to attend a BART board meeting at a board member's invitation, and the other to assist her mother following the death of her aunt—were asserted to be the initial basis for discharge. The EEOC determined that there was reasonable cause to believe that Petitioner's charge was true, based upon the disparate application of Respondent's so-called compelling reason absence policy.

Although the district court permitted the introduction of pretext evidence including evidence that Petitioner's accomplishments as Respondent's employee were deliberately belittled, it characterized such evidence as "just so much information" that didn't make "any impact". Indeed, the district court's findings of fact, with its focus on "cause" for discharge, omit any consideration of the evidence of disparate treatment or evidence that the asserted grounds for discharge were in fact pretextual.

The district court placed great emphasis at trial upon Petitioner's lack of physical characteristics indicative of color or race. Repeatedly, the court asked witnesses, and non-witnesses in the court if they believed Petitioner was caucasian. The court had difficulty believing that Mexican-Americans were a protected ethnic group, stating at trial "I can't for the life of me figure out why a Mexican-American is any different than the American or French-American, German-American, or anything else . . . if Mrs. Salazar was black, I would have an entirely different reaction. It's just that I can't identify Mexican-Americans with the black complaint, which is legitimate."

The district court's finding that "no BART Management employee, including her supervisors, was aware of her national origin" is based solely upon the denials of knowledge by Petitioner's former supervisors. The court did not evaluate, consider, or make factual findings or legal conclusions concerning the following undisputed evidence:

1. Respondent's records, including affirmative action and payroll records, identified Petitioner's national origin;

2. Petitioner's surname and maiden name are indicative of foreign national origin;

3. Another co-worker greeted Petitioner in the office in Spanish regularly;

4. Shortly before her discharge, another co-worker heard Petitioner speak Spanish;

5. Petitioner requested the presence of a minority woman at her Merit Evaluations;

6. Prior to her discharge, Petitioner raised race discrimination charges at a grievance hearing attended by her supervisors;

7. Petitioner testified that she told her supervisors her national origin prior to her discharge.

REASONS FOR GRANTING THE WRIT

While this Court has frequently provided guidance as to the appropriate standards of proof to be applied in Title VII disparate treatment employment discrimination cases (see e.g. *Texas Dept. of Community Affairs* v. *Burdine* (1981), 450 U. S....., 101 S.Ct. 1089, *Furnco Construction Corp.* v. *Waters* (1978) 438 U. S. 567; *McDonald* v. *Santa Fe Trail Transportation Co.* (1976) 427 U. S. 273; *McDonnell Douglas Corp.* v. *Green* (1973), 411 U.S. 792, it has never considered the type of factual findings required to comply with the mandate of Federal Rules of Civil Procedure, Rule 52(a) that the district court "shall find the facts specially and state separately its conclusions of law thereon. . .", or the appropriate standard of review for ultimate factual findings of discrimination. The latter issue was expressly left open by this Court in *Burdine, supra,* 450 U. S....., 101 S.Ct. 1089, 1097, n.17.

This case squarely presents the issue of whether the district court's judgment based upon its ultimate factual finding that there was no discrimination, and the Ninth Circuit's affirmance based upon the "clearly erroneous" standard of review comply with the mandate of Rule 52(a).[4]

Rule 52(a) serves two related purposes. Specific findings give "the appellate court a clear understanding of the basis of the trial court's decision" and compel the district court to lay a factual foundation for the proper application of relevant legal principles. *Irish* v. *United States* (9th Cir. 1935) 225 F.2d 3, 8; *Otero* v. *Mesa County School District* (10th Cir. 1977) 568 F.2d 1312, 1316. Ultimately, Rule 52(a) forces a trial court to articulate the basis for its decision.

The district court's judgment is not supported with the type of factual findings required by Rule 52(a) and established Title VII case law. The district court's judgment is solely based upon three findings:

1. Its ultimate finding that there was no discrimination involved in the discharge of Petitioner. (Finding No. 15).

2. Its finding that there was good cause to discharge Petitioner. (Finding No. 13).

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[4]The applicability of the Rule 52(a) clearly erroneous standard of review in a related situation is presently before this Court. See *United Steelworkers of America* v. *Swint* (5th Cir. 1980), 624 F.2d 525, cert. granted, (1981) ..... U.S. ....., 101 S.Ct. 1972.

3. Its finding that Petitioner's supervisors were unaware of her national origin. (Finding No. 2).

None of these findings, either individually or together, are sufficient to support the judgment. Nevertheless, the Ninth Circuit's brief memorandum of affirmance is based *solely* upon its application of the clearly erroneous standard of review.

The district court's finding of nondiscrimination embraced the ultimate issue presented in the trial, and accordingly should have been tested by the clearly erroneous rule. The district court's finding cannot conceal "an absence of a critical review of the relevant facts culminating in a coherent body of factual findings which is particularly called for in a discrimination case." *Lewis* v. *Tobacco Workers* (4th Cir. 1978) 577 F.2d 1135, 1146, *cert. den.* (1979) 439 U. S. 1089.

Whether such ultimate findings should be tested by the Rule 52(a) clearly erroneous rule, or whether an appellate court may disregard the findings and independently review the record is an issue that has divided the Circuits. The Ninth and First Circuits have held that the clearly erroneous standard applies even to ultimate findings of no discrimination. See *Piva* v. *Xerox Corp.* (9th Cir. 1981) 654 F.2d 591, 594 n.l; *Sweeney* v. *Board of Trustees, Keene State College* (1st Cir. 1979) 604 F.2d 106, 109 n.l, *cert. den.* 444 U.S. 1045. The Eighth, Seventh and Fifth

Circuits, on the other hand, hold that such findings are reviewable independent of the clearly erroneous rule, although the clearly erroneous rule applies to subsidiary factual findings. See, e.g. *Strecker* v. *Grand Forks County Social Service Board* (8th Cir. 1981) 640 F.2d 96, 99; *Stewart* v. *General Motors Corp.* (7th Cir. 1976) 542 F.2d 445, 449, *cert. den.* 433 U.S. 919; *Causey* v. *Ford Motor Co.*, (5th Cir. 1975) 516 F.2d 416, 420-21; *Jackson* v. *City of Killeen* (5th Cir. 1981)..... F.2d ....., 26 FEP Cases 1515, 1517-18.

Moreover, the Ninth Circuit's affirmance herein fails to address the critical issue of the sufficiency of the district court's factual findings under Rule 52(a). Other Circuits have held that the failure to make subsidiary findings concerning evidence of disparate treatment and pretext constitutes a reversible failure to meet the Rule 52(a) requirement to "find the facts specially." See e.g. *Lewis* v. *Tobacco Workers, supra; Otero* v. *Mesa County School District, supra* at 1316; *Corley* v. *Jackson Police Department* (5th Cir. 1978) 566 F.2d 994, 1000 n.8; Cf. *Marable* v. *H. Walker & Associates* (5th Cir. 1981) 644 F.2d 390, 396 (housing case).

The district court's utter failure to make subsidiary findings of fact concerning substantial evidence of disparate treatment and pretext is not rendered negatory by its "good cause" for discharge finding since this finding did not meet the critical issues raised and the substantial evidence presented at trial.

Indeed, the "central focus of the inquiry" in a Title VII action "is always whether the employer is treating some people less favorably than others because of their . . . sex. . . ." *Furnco Construction Corp.* v. *Waters, supra* at 577 quoting *Teamsters* v. *United States* (1977) 431 U.S. 324, 335 n.15. The existence of good cause to discharge an employee does not immunize an employer from liability under Title VII. See e.g. *McDonald* v. *Santa Fe Trail Transportation Co., supra,* (theft of cargo); *McDonnell Douglas Corp.* v. *Green, supra* (criminal conduct); *Corley* v. *Jackson Police Dept., supra* (acceptance of bribes). Moreover, under the tests articulated by this Court, evidence that "the employer's proffered explanation is unworthy of credence" is central to proof of discrimination, see e.g. *Texas Dept. of Community Affairs* v. *Burdine, supra* at 1095; *Corley* v. *Jackson Police Dept., supra* at 999-1000.

The district court's finding that no management employee was aware of Petitioner's national origin simply ignored the bulk of Petitioner's evidence on the issue. The Ninth Circuit's affirmance similarly ignored the evidence, especially the undisputed evidence that Respondent's own records identified her national origin. As such, this finding also is insufficient under Rule 52(a). Even if the finding was sufficient, however, *it did not address Petitioner's evidence of disparate treatment on the basis of sex.* The district court and Ninth Circuit decision on the sex discrim-

ination claim is thus based solely upon the ultimate finding of no discrimination discussed above.

The district court's incredible finding that Petitioner's supervisors were unaware of her national origin must be rejected for three further reasons:

First, that finding was tainted by the district court's evident confusion over Title VII's definition of national origin. At trial, and in its findings,[5] the court appeared to equate national origin with race or apparent physical characteristics. National origin, although a protected status in Title VII, (42 U.S.C. §2000e-2) is not expressly defined by the Act. The legislative history, however, establishes that this category was intended to cover *all* national groups and groups of persons of common ancestry, heritage or background without regard to race, color or religion. "National origin, of course, has nothing to do with color, religion, or the race of an individual." 110 Cong. Record at 2549 (1964); Schlei and Grossman, *Employment Discrimination Law* (1976) at 246. This Court has explained that national origin "refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza* v. *Farah Manufacturing Company* (1973) 414 U.S. 86, 88.

[5]The only subsidiary finding supporting the court's finding of lack of knowledge, other than the finding concerning Petitioner's appearance is a finding that Petitioner told a co-worker she was "white". Although the court's finding suggests that Petitioner also denied she was Mexican-American, nothing in the record supports such a conclusion.

Thus, the race or color of Petitioner, or the specific country of origin, is simply not a relevant factor in determining whether or not Petitioner was discriminated against on the basis of her national origin. Accordingly, the court's finding is tainted by an erroneous view of the law.

Secondly, the district court's failure to consider the undisputed evidence that Respondent's own records identified Petitioner's national origin betrays a failure to apply well-established rules of agency and doctrines implicit in Title VII itself.

Under common law and statute, a corporation's agents are deemed to have notice of a corporation's own records. See, e.g. *Sanders* v. *Magill* (1937), 9 Cal. 2d 145, 154; *Phillips* v. *Sanger Lumber Co.* (1900) 130 Cal. 431, 434; California Civil Code §2332; 1 Witkin *Summary of California Law*, (1973) Agency and Employment §139 at p. 743.

Title VII itself defines employer to include "any agent of such a person", 42 U.S.C. §2000e(b), an express recognition of agency principles. Although no case has directly addressed the issue herein, the statute's definition of employer should be given a liberal construction to effectuate the "remedial purpose of eradicating discrimination in employment." *Spirt* v. *Teachers Insurance and Annuity Assoc.* (*S.D.N.Y.* 1979) 475 F. Supp. 1298, 1308 quoted in *EEOC* v. *Wooster Brush Co.* (N. D. Ohio 1981)..... F. Supp.

....., 26 FEP Cases 1602, 1605; See also *Quijano* v. *University Federal Credit Union* (5th Cir. 1980) 617 F.2d 129, 131; *Baker* v. *Stuart Broadcasting Company* (8th Cir. 1977) 560 F.2d 389, 391. A construction of the definition of employer that embraces an established principle of agency law such as constructive knowledge, or at least a presumption of such knowledge furthers Title VII's remedial purpose. Not only would such a construction help to overcome the nearly insurmountable burden of establishing discriminatory intent in a disparate treatment case, but since the doctrine of constructive knowledge itself embodies a common sense perception verified by long usage, erecting a presumption of knowledge is a "sensible, orderly way to evaluate the evidence in light of a common experience. . . ." *Furnco Construction Corp.* v. *Waters, supra* at 577.

Finally, even a cursory review of the evidence establishes that the court's finding is clearly erroneous. The only evidence on point introduced by Respondent consisted of self-serving denials of knowledge by Petitioner's supervisors. All the objective evidence introduced on the issue, including Respondent's own records, Petitioner's surname, the undisputed evidence of her supervisors presence at grievance hearings where she raised race discrimination issues,[4] and other circumstantial evidence compels

[4]The fact that Petitioner, who is concededly caucasian, styled her grievance as one of race does not undermine the inference that her supervisors were thus on notice as to her national origin. Lay people, as well as judges, often confuse the protected categories of race and national origin.

a finding that Petitioner's supervisors knew of her foreign national origin.[7] Although the testimony of her supervisors is "some evidence", when the rest of the evidence and the district court's own evident confusion as to the relevant characteristics of national origin are considered, "a definite and firm conviction that a mistake has been committed" is compelled, *United States* v. *United States Gypsum Co.* (1948) 333 U. S. 364, 394-5.

CONCLUSION

As noted above this Court has repeatedly had to exercise its discretionary review authority in order to bring lower courts into accord with a correct and consistent articulation of the standards for disparate treatment discrimination cases. Herculean though these efforts may be, lower courts continue to circumvent the correct application of these standards by making conclusory findings while paying lip service to the oft repeated standards for disparate treatment cases. It is only through rigorous application of Rule 52(a) that a district court will be compelled to lay out the basis for its decision, thus revealing whether or not it is in fact applying the correct standards articulated by this Court. This case presents the issue squarely.

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[7]No authority requires proof that Petitioner's supervisors were aware of her specific national origin, so long as they were aware of her *foreign* origin.

Accordingly, Petitioner respectfully requests this Court to grant her petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: November 24, 1981

Respectfully submitted,

FARNSWORTH, SAPERSTEIN & BRAND
Attorneys for Petitioner
By: BRAD SELIGMAN

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSE M. SALAZAR, Plaintiff/Appellant, v. SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, Defendant/Appellee.	NO. 75-1842 D.C.No.C-73-0188-LHB MEMORANDUM

Appeal From the United States District Court
For The Northern District of California,
The Honorable Lloyd H. Burke,
District Judge, Presiding.
Argued and Submitted July 15, 1981

Before: NELSON and NORRIS, Circuit Judges, and REAL,* District Judge

Salazar appeals from the district court's judgment for appellee Bay Area Rapid Transit District [BART] on her claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000 et seq. On the basis

*The Honorable Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.

of the record before us, we cannot say that the district court's findings of fact are clearly erroneous. We cannot disturb the district court's finding that there was no discriminatory motive, especially in light of the absence of any direct evidence that Salazar's supervisors at BART were aware that she is Mexican-American. Thus, the findings amply support the district court's conclusion that BART did not discriminate against Salazar on the basis of her national orign or on the basis of her sex.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

ROSE M. SALAZAR,	)	
	)	
Plaintiff,	)	NO. C-73-1088 LHB
	)	
v.	)	FINDINGS OF FACT
	)	AND CONCLUSIONS
SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,	)	OF LAW
	)	
	)	
Defendant.	)	

This matter came on for trial by the Court without a jury on December 9, 1974, the trial continuing on December 10, 11, 12, 16, 17, 18, 19, 23 and 24, 1974, and the Court having heard and considered the evidence and arguments, and having the opportunity to observe the witnesses, both parties being represented by counsel and afforded full opportunity to present evidence relevant to this action, and proof being offered to the satisfaction of the Court, the Court finds the facts and states

the conclusions of law as follows:

FINDINGS OF FACT

1. Defendant, SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT ("BART"), is a governmental agency, organized and existing under the laws of the State of California, which owns and operates a rapid transit system in Alameda, Contra Costa, San Francisco and San Mateo Counties. It is undisputed that at all times relevant hereto, defendant BART was engaged in an industry affecting commerce and had in excess of 15 employees.

2. Plaintiff is a female of Mexican-American national origin. Her national origin is not apparent from her appearance or speech. During her employment, no BART management employee, including her supervisors, was aware of her national origin. No witness except one knew, before plaintiff was terminated, that she was of Mexican-American national origin. In fact,

she told her friend and fellow employee, Lizzie Payne, that she was not Mexican-American, but "white."

3. At all times relevant to this litigation, i.e., from March 1, 1971 to March 27, 1972, Dan Carson was employed by BART as Office Manager in the General Services Department.

4. In March of 1971, plaintiff was advised of a job opening at BART for a PBX Operator-Receptionist job by The Pacific Telephone and Telegraph Company, which conducted a job referral service for PBX operators. On March 4, 1971, plaintiff was interviewed by BART and hired as a BART employee at $550 per month, an amount in excess of the beginning salary for PBX operators of $450 per month and above the median of the salary range for that position.

5. Plaintiff was hired to work in the General Services Department, under the immediate supervision of Dan Carson and

under the general direction of William Benedict, Director of General Services.

6. During the one year period of her employment, plaintiff did not adequately perform the duties of the PBX Operator-Receptionist job. She refused to follow directions or take constructive comments from her supervisor and refused to follow ordinary established channels for making her complaints. She was away from her position as a switchboard operator on extended breaks in excess of 61 occasions and was absent from work a total of 185 hours, not including vacation time, which was more than twice the average absence time of employees in the General Services Department. As a result of plaintiff's poor performance, she had to be repeatedly counseled, warned and reprimanded on more than 15 occasions.

7. Plaintiff's performance was discussed with her on numerous occasions,

including meetings on June 24 and 29, September 13, 14 and 15 and October 4 and 6, 1971. At three of these meetings it was necessary to warn plaintiff of possible disciplinary action or discharge if her unacceptable performance continued.

8. Plaintiff was denied a merit increase in September of 1971, solely because of her poor performance. She was reviewed again in December of 1971, and was given the increase because she had shown a temporary improvement in her performance.

9. Beginning in January of 1972, plaintiff's performance again deteriorated. As a result, plaintiff was counseled on January 12, February 16 and 24, and March 1, 1972, regarding her performance as a BART employee,and at two of these meetings she was again warned of the possibility of discharge. Nevertheless, her poor performance continued.

10. Plaintiff applied for transfers

to the position of ACDS Foreman I in early December, 1971, and to the position of Transportation Clerk III in January, 1972. Plaintiff was not selected for the position of Foreman I because her performance record was unsatisfactory and because she was less qualified than another female employee of BART, Maria Robie, who applied for and was given the position. The position of Transportation Clerk III was given to Nancy Nixon, a female. It was not given to plaintiff because of her failure to meet the qualifications of the position, her history of poor performance and her failure to appear for an interview as scheduled by L. W. Breiner, Transportation Superintendent. At all times relevant hereto there has been a legitimate typing requirement of 50 words per minute for the position of Transportation Clerk III. Plaintiff did not consider herself a typist or capable of passing the typing test and therefore

declined to take the typing test. Nancy Nixon passed the typing test with a score of 56 words per minute.

11. Plaintiff also contends that she applied for transfers to the positions of Passenger Service Representative, Station Agent, ACDS Operator and Motor Vehicle Dispatcher between December 6, 1971, and February 29, 1972. From December 1, 1971, to April 1, 1972, there were no openings and no one was hired for the positions of Passenger Service Representative, Station Agent, ACDS Operator or Motor Vehicle Dispatcher. Moreover, with the exception of Motor Vehicle Dispatcher, these positions were already occupied or were filled after plaintiff was terminated by females, many of whom were Black and Spanish-surnamed Americans.

12. At no time during her employment at BART was plaintiff denied a transfer, promotion or salary increase or in any

other fashion disparately treated based in any part upon her sex or national origin. At all times, plaintiff was treated appropriately in view of her performance, absence record and work record.

13. On March 22, 1972, plaintiff had a telephone conversation with her supervisor, Dan Carson. At no time during this conversation was Mr. Carson asked to give, nor did he give, permission to plaintiff to be away from her position on March 23 or 24, 1972. In spite of this, on the morning of March 23, 1972, plaintiff failed to report to work as scheduled and instead attended a BART Board of Directors meeting. When plaintiff was counseled on the afternoon of March 23 for her failure to report as scheduled, she indicated that Mr. Carson had given her permission on March 22 to attend the Board of Directors meeting and had also given her permission to take the afternoon of March 24, 1972, off from work

to assist her mother in making funeral arrangements for a relative. Mr. Carson at no time granted such permission. Plaintiff was so advised and was told in the presence of Mr. C. G. Trafton that if she absented hereself on March 24, 1972, she would be terminated. On March 24, 1972, plaintiff was absent from work the entire afternoon without permission. Plaintiff was terminated based upon that absence and her prior history of poor performance, including her record of absences and her inability to get along with her supervisors and co-workers. The funeral referred to by plaintiff was held on March 20, 1972, two days before she contends she received permission from Carson to assist her mother in making these funeral arrangements.

14. After plaintiff's termination, the PBX operator position which she vacated was filled by Mrs. P. Zocchi, a female Spanish-surnamed American.

15. Plaintiff was not terminated because of her sex or national origin. She was terminated for legitimate, non-discriminatory reasons, which were not used as a pretext for sex or national origin discrimination.

16. Plaintiff initiated a grievance with respect to her termination. This grievance was processed through the fourth and final step of the available grievance procedure and was denied. At this time, there was no procedure for submitting the grievance of any employee to arbitration. Plaintiff was in no way discriminated against by defendant on the basis of her sex or national origin in the processing of her grievance.

17. Between March 27, 1972, when she was terminated from BART, and April 3, 1973, plaintiff made only six applications for employment. During this period, she did not make a serious, good faith effort

to obtain employment. On April 3, 1973, plaintiff was seriously injured in an automobile accident. Since that date she has been unable to hold gainful employment.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action under section 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e-5(f)).

2. Defendant has not violated any rights of plaintiff under said Act and defendant is entitled to judgment that plaintiff take nothing by her complaint and defendant shall have its costs of suit herein, including such reasonable attorneys' fees as may be granted by this Court.

It is so ORDERED, and judgment will be entered in accordance herewith.

Dated: January 24, 1975.

/s/ Lloyd H. Burke
Judge of the United States District Court

Office - Supreme Court, U.S.
FILED
JAN 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1024

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROSE M. SALAZAR,
Petitioner,

vs.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition to Petition

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January 1982

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QUESTIONS PRESENTED

After reviewing the Petition and the arguments advanced by counsel, it appears that the following issues should be considered by this Court in the event that the Writ is granted:

1. Are the District Court's Findings of Fact sufficient and adequate in resolving the issues raised in this disparate treatment case?

2. In a case claiming national origin discrimination, where the theory of proof is disparate treatment, must the employer's supervisors have actual knowledge of plaintiff's status or is constructive knowledge, based on company records, sufficient to permit an inference that the employer's reasons for discharge were a pretext?

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Brief in Opposition to Petition

Respondent San Francisco Bay Area Rapid Transit District opposes the granting of the Writ petitioned for herein.

STATEMENT OF THE CASE

This is a single plaintiff employment discrimination case brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*). On March 27, 1972, plaintiff, a woman of Mexican-American national origin, was discharged by defendant, San Francisco Bay Area Rapid Transit District ("BART").[1] She sued, alleging that her

1. BART is a local governmental agency, a rapid transit district established and governed by §§ 28,500, *et. seq.* of the California Public Utilities Code.

discharge was unlawful because it was based on her national origin and sex.[2]

Trial was held in December 1974 and consumed ten days. No direct evidence of discrimination was adduced. Plaintiff's entire case was an attempt to show disparate treatment and thereby rebut BART's direct evidence of the legitimate, non-discriminatory reasons for the decision to fire plaintiff. BART also presented evidence to show either that the instances of claimed disparity did not occur as perceived by the plaintiff or that there were legitimate reasons for the actions which she believed were unfair to her.

The District Court ruled in favor of BART at the conclusion of trial. This was followed by detailed Findings of Fact and Conclusions of Law (Appendix B to the Petition), and judgment was entered in January 1975.

After a protracted delay,[3] the plaintiff's appeal was heard by the United States Court of Appeals for the Ninth Circuit, which issued a Memorandum opinion (Appendix A to the Petition) affirming the District Court.

Plaintiff was hired by BART in March 1971 as a PBX Operator-Receptionist. She was fired a year later for being absent from work, in violation of explicit instructions, as well as for her prior history of poor performance, including her record of absences and her inability to get along with her supervisors and co-workers. (Finding of Fact No. 13).

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2. Although the complaint contained other allegations of discriminatory treatment, those claims were not cognizable under Title VII. The amendments to the Equal Employment Opportunity Act of 1972, 86 Stat. 103, which made Title VII applicable to public employers, were not effective until March 24, 1972.

3. This case was previously before this Court on a Petition for Certiorari filed by BART to obtain review of a procedural issue relating to the timeliness of the filing of the notice of appeal. *Salazar v. San Francisco Bay Area Rapid Transit District*, Docket No. 76-395; Petition denied, 429 U.S. 951 (1976).

Plaintiff's mechanical proficiency with the switchboard was not a question in this case. Rather, it was the plaintiff's personality and attitude which created problems. The following excerpt from a trial exhibit was cited by the trial court as a reasonably accurate description of plaintiff's work history and attitudes at BART:

> "Almost from her date of hire in March of 1971, Salazar has found it fashionable to ignore the directives of management in terms of following generally accepted and explicitly stated lines of authority and communication. It has been documented and can be shown that despite numerous warnings from her immediate supervisor and Department Head to present her problems and questions in a logical manner and along established lines of departmental authority prior to seeking the assistance of outside employees within the District, that Salazar has constantly refused to follow acceptable procedures. She has in a very short period of service succeeded in alienating an unbelieveably high percentage of District management representatives and fellow employees. As evidenced by the employee's list of grievances as contained in the preceeding 'STATEMENT OF THE CASE' very little occurs in or around Salazar which she does not feel compelled to resist, debate and complain about."

The trial record showed numerous manifestations of plaintiff's abrasive and insubordinate personality. For example, there was evidence of a high rate of absenteeism and of taking excessively long breaks. Plaintiff complained at length about the procedures, equipment and scheduling at the switchboard, seeking to substitute her judgment for her supervisor's and, in one instance, for the telephone company's. The record reveals instances, between plaintiff and her co-workers, of bickering, threats and, according to plaintiff, an assault. Plaintiff's poor performance led to

poor formal evaluations and to denial of a salary increase. (Finding of Fact No. 8). She frequently was counseled and was warned of disciplinary action or discharge on several occasions. (Findings of Fact No. 7 and 9).

Of course, plaintiff's version of her work record differed from that of her supervisor. In fact, the record in this case reveals that in almost every instance where plaintiff interacted with her supervisor, the plaintiff had a different recollection or perception of the event. She testified, for example, that on the day she was hired she was promised an automatic salary increase. Her supervisor denied that any such promise was ever made to plaintiff or to any other employee. On her last day of employment, she was told she would be fired if she left work. She denied being so informed. These incidents are not isolated examples. They are merely the first and last in the chronology.

The issue of credibility was also important in connection with the evidence regarding her supervisors' lack of knowledge that plaintiff was a Mexican-American. Plaintiff's immediate supervisor and the department head to whom he reported testified that they did not know her national origin. Other management employees with whom plaintiff had contact did not know that plaintiff was Mexican-American, and there was evidence that plaintiff told a co-worker she was white. In addition, the record is very clear that plaintiff was not identifiable through some physical characteristic as Mexican-American.[4]

Facts relevant to the issue of disparate treatment were also controverted. For example, plaintiff claimed to have applied for six other jobs at BART, and she assigned

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4. The EEOC investigator testified that he could not determine plaintiff's ethnicity if he saw her on the street, that she spoke English well and looked more Irish than Mexican-American.

discrimination as the reason for the rejections. The evidence showed, however, that four of the jobs were not even available and that better qualified persons were hired for the other two.

The District Court had the opportunity to see and hear the witnesses and to evaluate their candor. Its resolution of the hotly contested facts is set forth in detail in the findings.

REASONS WHY THE WRIT SHOULD BE DENIED

Despite the legal issues which the Petition seeks to raise, it appears to us that Petitioner's real purpose is to have yet another tribunal review the factual issues which were decided against her. We would not be reluctant to debate the facts in this case, since they amply support the District Court's judgment. However, factual review, even of a disputed case such as this, would not appear to be among the "special and important reasons" which must appear to justify the writ requested. Rules of the Supreme Court, Rule 17. Because this case is unique, any decision involving only the facts would be of importance only to the litigants.

To justify further review of this case, the Petitioner argues that the findings are inadequate because of the District Court's "failure to make subsidiary findings of fact concerning substantial evidence of disparate treatment. . . ." (Petition, p. 12). However, it is crucial to note that the Petition does not identify any specific evidence or claims of disparity which are not covered by the findings. This was not an oversight, since the same contention was asserted in the Court of Appeals and rejected.

In fact, the findings deal adequately with all bases for a claim of disparity in treatment. The differing performance appraisals given to plaintiff and a co-worker are covered by Finding No. 8. With respect to plaintiff's claimed applications for other jobs, the District Court made findings either

that the persons hired were better qualified, that plaintiff was unqualified, or that there were no openings and no hiring. (Findings of Fact No. 10 and No. 11). With respect to the claim of disparate treatment in connection with a grievance procedure, which plaintiff claimed entitled her to outside arbitration, the District Court found that no such grievance procedure existed. (Finding of Fact No. 16).

There were other instances where plaintiff claimed to have been treated unfairly, although there was no evidence which would permit comparison to the treatment accorded to some other similarly situated person. The District Court's findings about plaintiff's employment history cover these instances of claimed unfairness, particularly Findings 6, 7, 9 and 12. In substance, the District Court found that plaintiff's poor performance was the cause of everything that occurred.

Petitioner lists seven items of evidence (Petition, pps. 8-9) which she asserts were not covered by findings. These evidentiary items, however, are only relevant to the issue of the supervisors' knowledge of plaintiff's Mexican-American origins. The evidence obviously was rejected, because the District Court found that the supervisors did not know she was Mexican-American.

In summary, it does not appear that there is any significant issue as to the adequacy of the findings in this case. However, even if some gap in the findings could be demonstrated after full briefing and review of the record, the prospect of a resolution of the question thereby raised would not appear to be a special or important reason which would justify the granting of the writ.

Petitioner also suggests that this case should be used to review an apparent conflict between the circuits regarding the standard of review in discrimination cases. In our view, this contention raises, at most, an abstract question. The

Memorandum opinion of the Ninth Circuit neither addresses this issue specifically and nor provides any basis for inferring that either approach to the question would have had any impact in this case. Thus, in sum, the Petition does not demonstrate that the resolution of that issue would make any difference in this case.

Finally, Petitioner raises an interesting legal argument regarding constructive notice. The District Court found that: "During her employment, no BART management employee, including her supervisors, was aware of her national origin." (Finding No. 2). Certain personnel records, however, reflected that she was Mexican-American, although there was no evidence adduced at trial which indicated that the supervisors knew the contents of those records. Petitioner argues that the supervisors should be charged with that knowledge constructively, under principles of agency law.

However, the argument ignores the fact that the key issue in a disparate treatment case such as this is the issue of intentional discrimination. Constructive knowledge would permit a finding of intent where none exists.

The fallacy of the argument is shown by considering the burdens of proof and production of evidence involved in a typical case. Assuming a prima facie case of discrimination is established the employer must come forward with evidence. The defendant must specify "some legitimate, nondiscriminatory reason" for the employment decision. *McDonnell Douglas Corp. v. Green,* (1973) 411 U.S. 792, 802. "To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Texas Dept. of Community Affairs v. Burdine,* (1981) 450 U.S. 248, 255. If the employer comes forward with such evidence, the plaintiff

has the opportunity to show that the proffered reasons for the employment decision were not the true reasons—that the asserted basis for the action was a pretext. The ultimate focus of this inquiry is whether "the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas Corp. v. Green,* (1973) 411 U.S. 792, 805.

At this point in the fact finder's analysis, motivation and intent become directly in issue, at least in the type of case which is at hand.[5] A pretext necessarily involves some kind of improper motive.

Evidence of disparate treatment is merely circumstantial evidence of discriminatory motive. Thus, for example, if it is shown that there was an inconsistent application of the articulated reason for the decision, and that the inconsistency is based on lines which suggest that race made a difference, an inference of improper motive may be drawn.

We submit that such an improper motive can never be inferred if the person whose state of mind is in issue was not aware, in fact, that the person allegedly discriminated against possessed the particular characteristic on which the claim of discrimination is founded. A person cannot be motivated by racial animus against another individual if that person does not know the race of that individual.

Thus, knowledge of plaintiff's ethnicity is important in this case only because the state of mind of the plaintiff's supervisor is important, and actual knowledge, not constructive knowledge, is the crucial element.

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5. Of course, we distinguish other Title VII cases in which proof of discriminatory motive or intent is not required. Such cases are generally characterized as "disparate impact" or "present effects of past discrimination" cases. See Schlei & Grossman, *Employment Discrimination Law* (1976) p. 1158.

However interesting the argument over this question may be, there are no compelling reasons for its resolution by this Court. As the foregoing brief discussion demonstrates, the Petitioner's argument makes no sense, and it was properly rejected by the Court of Appeals.

Second, if the absence of any reported decisions on point is any indication, the issue is not important. Thus, it appears that in almost all cases involving intent and discriminatory conduct there is never a question of whether the aggrieved person is known to be a member of a protected class. The question of constructive knowledge is never in issue.

Finally, and most important, even if Petitioner prevails with her argument, it would not compel reversal of the District Court's judgment. Lack of knowledge of plaintiff's national origin was only one basis for the judgment. It went only to the claim of national origin discrimination. The other detailed findings go to both gender and national origin discrimination and support the judgment even without the challenged finding.

Thus, the argument, while interesting, does not create a special or compelling reason for reviewing this case.

CONCLUSION

Although Petitioner is obviously dissatisfied with the decisions of the courts below, it has not been demonstrated that there are any issues involved in the case which merit the attention of this Court. The case is one which was determined by its facts. The facts found by the District Court have been fully articulated and reviewed by the Court of Appeals. Ms. Salazar has had her day in court.

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated: January 19, 1982.

Respectfully submitted,

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